IN THE

Supreme Court of the United States

October Term, 1966

No. 615

RALPH BERGER,

Petitioner,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Opinions Below

The Court of Appeals of the State of New York affirmed the judgment without opinion, Chief Judge DESMOND and Judge FULD dissenting in an opinion reported at 18 N.Y.2d 638, 640.

The Appellate Division of the Supreme Court of the State of New York, First Department, unanimously affirmed the judgment without opinion (25 App. Div. 2d 718).

Statement

The defendant, a Chicago public relations man, was convicted, after a four-week trial (SCHWEITZER, J. and a jury) of two counts of CONSPIRACY TO BRIBE A PUBLIC OFFICIAL (New York Penal Law §§580, 378). On December 17, 1964 the petitioner was sentenced to one year in the Penitentiary on each count, the sentences to run concurrently.

The evidence established that the defendant, Ralph Berger, was a party to two separate agreements, each with the same object: the delivery of sums of money to a corrupt public official in return for which valuable liquor licenses would be issued. The first instance involved the Playboy Club, seeking a license which would enable them to open on a membership basis. After numerous conferences with the officers of the organization which would operate the club, the petitioner solicited and agreed with Arnold Morton, Robert Preuss, Victor Lownes and Hugh Hefner that the most efficacious method of obtaining the license they sought was by a direct and unvarnished bribe to the Chairman of the State Liquor Authority, Martin Epstein, in the amount of $50,000. Forty-one thousand dollars of that sum was actually turned over in installments to the defendant Berger for transmission to the public official. In addition, the Playboy management laid out $16,500 plus "expenses" to Ralph Berger for his "services," and $20,000 to Judson Morhouse for his assistance, and indeed his guarantee that the desired license would be obtained.

In May of 1962, toward the conclusion of the Playboy conspiracy, Harry Steinman, who was also involved in the Playboy deal, introduced Frank Jacklone to the defendant Berger. Jacklone was the prospective operator of a supper club, called the Tenement, which had been applying unsuccessfully for a liquor license. Several weeks later, the defendant, coming from Martin Epstein's hospital room, went directly to a restaurant where Jacklone met him pursuant to a previous arrangement. Berger told Jacklone that he had just spoken to Epstein and the license would cost $10,000 which would go to the Chairman. Berger would only subtract for himself money to cover his own expenses. Jacklone agreed to the deal, Berger telling him that he was handling Playboy's application and it was "costing them a lot more." Moreover, during the trial the People introduced evidence which had been obtained through the use of eavesdropping devices placed in the office of the defendant's co-conspirator, Harry Steinman, pursuant to court order. These conversations, in which the defendant participated, conclusively corroborated, in every essential detail, the testimony of an accomplice concerning the existence and nature of the Tenement Club conspiracy.

A. THE PRE-TRIAL HEARING CONCERNING THE EAVESDROP ORDERS

In January, 1962, a Mr. Ralph Pansani came to the District Attorney's Office with a complaint against the State Liquor Authority (hereafter: S.L.A.). The complainant related that agents of the S.L.A. had entered his bar and grill and seized his books and records, an act, the

complainant thought, done in reprisal for previous dealings with the Authority. For, two years before, Pansini had agreed to pay a bribe to the S.L.A. in order to obtain a liquor license, and, after receiving the license, he had reneged and refused to make payment (A85).* A check of the files in the District Attorney's Office had then disclosed numerous complaints against the S.L.A. charging that people seeking liquor licenses had been forced to pay bribes (A86). Mr. Pansini, moreover, was at this time attempting to obtain a liquor license for a store on West 45th Street, a "saturated area," where there were already many liquor stores and where, consequently, the "price" for a license would be "very high" (A57).

Equipped with a Minifon recording device, Pansini was sent to see Albert Klapper and Harry Neyer, an attorney recommended by Klapper, and recorded conversations on March 21, 1962 (A55), March 28, 1962 (A56), and March 29, 1962 (A56). During these interviews, Klapper told Pansini about the procedures for obtaining a liquor license in New York. Klapper indicated that it was unusual for him to be talking to Pansini at all, since the deals are invariably arranged through certain attorneys, and only by consulting these attorneys can a liquor license be obtained (A57). When Pansini asked to be allowed to discuss the matter with Martin Epstein, the Commissioner of the S.L.A. Klapper informed him that "Mr. Epstein doesn't want to even know Mr. Pansini's name; he doesn't even want to know what he looks like or even meet him; that he must deal only through an attorney and through himself" (A57).

* References, unless otherwise indicated, are to pages of the Appendix record on appeal.

Pansini was then told that the attorney he would have to see was Harry Neyer, a former employee of the S.L.A. (affidavit of April 5, 1962, supp. p. 6)* and that the price for the liquor license would be $10,000 (A57). During the interview with Neyer, the attorney told Pansini that he had worked with Klapper in the past, and that he is "quite well aware of the going rate to get a liquor license downtown" (A57).

On the basis of "evidence" submitted to Justice Sarafite (A90), together with affidavits, an eavesdropping order was obtained on April 13, 1962, permitting the installation of a recording device in the office of Harry Neyer, Room 1001 at 22 West 48th Street (A53).

Recorded conversations which took place in the office of Neyer then revealed another conspiracy involving a bribe for a liquor license. This transaction concerned the Palladium, located at 1698 Broadway, a dance hall with a liquor license. The Palladium apparently had been raided by the police, under the auspices of the District Attorney's Office, and narcotics had been found on the premises (A58). Consequently, proceedings concerning the revocation of the liquor license had been instituted (A58). A Mr. Howard Mauro came to Neyer's office and told the lawyer that he wanted the Palladium to retain its license. Neyer responded that "it is going to be difficult; that the District Attorney's Office will be watching this particular matter and it is probably going to cost him in the area of five figures" (A59). Later, Neyer's side of telephone conversations pertaining to this transaction were overheard in which

* "Supp." references are to the separately printed supplement to the record containing exhibits.

the lawyer remarked that "this is going to be a big one," and mentioned the price as $30,000. After one of these conversations, Neyer called back Mauro and told him that "it is really going to cost him to get that liquor license even higher than he initially told him" (A59). Furthermore, Neyer was visited by a Harry Steinman in connection with this transaction. Steinman agreed to pay $30,000 through Neyer to officials of the S.L.A. to secure the Palladium license (affidavit of June 11, 1962, supp. p. 10), and, after the meeting, Steinman was followed by detectives to his office (A59), and then identified as a prospective liquor license applicant in his own right and nightclub owner (supp. p. 10). It was further learned through the installation in Neyer's office, that conferences relating to the payment of these unlawful fees occur in Steinman's own office (*ibid.*).

On this information, an eavesdrop order was obtained on June 12, 1962, permitting the installation of a recording device in the office of Harry Steinman in Room 801 at 15 East 48th Street.

From this installation, evidence of the conspiracy to bribe public officials in order to obtain a liquor license for the Playboy Club and the Tenement, subjects of the indictment against Berger, was uncovered (A60).

B. THE EVIDENCE

The People's Case

The Playboy conspiracy

Arnold Morton, vice-president and operational director of Playboy Clubs, International, Inc. [the parent corporation of the Playboy Club of New York], explained how the Club operates (A134). Membership, which the Club solicits by mail, is obtained by the purchase of a key (A136). Only key holders are admitted to the Playboy Clubs. The majority stock interest in Playboy Clubs, International, Inc. is held by Hugh M. Hefner, who also controls H. M. H. Publishing Corp., the corporation that publishes Playboy magazine (A136).

In the early summer of 1960, the witness met the defendant, Ralph Berger, in Morton's father's restaurant in Chicago, where Morton knew the defendant as a customer for almost twenty years (A137, A179-81). On this occasion, the defendant told Morton that the Playboy Club was going to have "serious problems" in getting a liquor license in New York (A137). Two or three weeks later, Morton again met Berger who told Morton he would be entertaining Chairman Martin Epstein of the New York State Liquor Authority (A138). Morton invited the defendant to bring Epstein to see the Chicago Playboy Club and arranged for a membership key to be made available to them (A138).

At their next meeting a week or two later, Berger told Morton that he didn't have time to take Epstein to the Chicago Playboy Club, but stated Epstein was "extremely

upset" by the Playboy Club mailings and "method of operation" (A139). Berger also told Morton that Epstein said "it will cost $50,000 to get a liquor license to open up in New York" (*id.*). When Morton asked why, Berger only replied "it cost Gaslight $60,000 to get a license and they were still having problems because they didn't go through the right channels" (*id.*).

Morton relayed this conversation to the principals of the Playboy organization (*id.*) and a week later was told by Berger that he had set up a meeting with Epstein in New York (A140). At this meeting, Morton did nothing more than shake hands with Epstein in the lobby of the latter's office at 270 Broadway, New York City (A141). Berger then apologized to Morton for bringing him to New York just to shake hands with Epstein, and said he would set up another appointment and there would be an opportunity to talk to Epstein at a later date (A142).

Subsequently, Berger told Morton that "the man to see" in New York to file a liquor license application was Hyman Siegel, "a liquor attorney," and he, Berger, was going to New York to meet him (A143). Morton later had two meetings with Hyman Siegel, the first on October 29, 1960, and at both of these meetings Berger was present. Siegel was paid a $5,000 retainer on November 7, 1960 (A309).

Siegel recommended that Playboy establish "a not-for-profit club" in New York in order to employ the key type of operation (A144). Playboy wanted instead the normal liquor license, designated an "RL" license, to avoid the tax problems that would accompany a not-for-profit operation.

[**Hyman Amsel**, counsel to the Liquor Authority, explained that it was the position of the New York State Liquor Authority since 1960 that the ordinary liquor licensee must be open to the public at large. Only a not-for-profit club could use the requirement of club membership to exclude the general public (A733-6).]

Morton testified further that in December, 1960, the defendant told him that Epstein was extremely upset over the mail solicitations for memberships that Playboy was sending into New York (A146). Berger then set up a meeting in January, 1961, in New York among Epstein, Hugh Hefner, and Victor Lownes, another officer of Playboy (A146).

In February, 1961, Morton told Berger the Playboy people thought they were wasting their time with Berger because they could make no headway with Epstein who kept insisting the Playboy method of operation was illegal (A147). Morton told the defendant that Playboy would have to "go to court" (*id.*). [In March 1961, Hyman Siegel returned his $5,000 retainer to Playboy (Preuss, A310).]

Berger, then or shortly thereafter, asked for $7500 for his services for Playboy (A148). Morton replied that he could see no reason to pay Berger, as Playboy had already given Berger expense money, but he would discuss it with his associates (A148). In May 1961, Playboy paid the defendant $5,000 (A148).

Shortly after this payment, Berger renewed his contact with Morton and told him he had the liquor Chairman "all smoothed out" and that "the number one man in New York, Judson Morhouse," wanted to see Morton (A150).

Morton met Morhouse in New York with the defendant early in May, 1961 (A152). Before the actual meeting with Morhouse, Berger told Morton "the $50,000 deal with Commissioner Epstein is on" and that Playboy would have to "make [its] own deal" with Morhouse (*id.*).

At this meeting, Morton told Morhouse the problem Playboy had regarding the type of license it should apply for, and that Epstein was "very upset" about the Playboy "method of operation" and its mailings (A155). Morhouse told Morton, "Well, I think I can work—we can work these things out" (*id.*). Morhouse also mentioned he could conceivably appoint the next liquor Chairman as Epstein was "a very old man" and also discussed the possibility of changing some of the archaic liquor laws through legislation (*id.*). Morhouse agreed that Playboy should apply for an "RL" type license (*id.*).

Morhouse then asked Morton for a $100,000 stock option, a $20,000 per year retainer (A156), and discussed the possibility of his operating a string of gift shops within the clubs (A155). Morton said he would have to discuss it with the principals of his company.

Subsequently, Morton returned to visit Morhouse accompanied by Victor Lownes. Morhouse again discussed the stock option, the $20,000 per year retainer, and the gift shops (A158-9). Morton and Lownes agreed to the $20,000 yearly retainer, but said they could not give Morhouse the gift shops nor the stock options (A159).

Morhouse thereafter met with Morton, Lownes, Hefner, and Preuss at the Playboy offices in Chicago where

again there was discussion of the stock options, gift shops and the $20,000 yearly retainer (A163-4). Morhouse specified he wanted the retainer paid by the Playboy magazine and not the Playboy Club (A164).

After meeting with Morhouse a second time, Morton and Preuss met with Berger, who asked for the first installment of $25,000 in cash for Epstein (A165). Playboy insisted on paying by check (*id.*) and Berger was given two $12,500 checks, one drawn to Lee Berco Co. Inc. and the other to Harry Steinman, both of which payees were designated by Berger (A166-7). Berger told Morton he intended to cash the two checks, pay the taxes owing on them, and deliver the balance to Chairman Epstein (A168).

Two weeks after Morton and Lownes met with him, Morhouse came to Chicago and met with the four Playboy officers (A160). Morhouse was again told he couldn't have the stock options or gift shops (A163), and Morhouse suggested an attorney named Jerome Marrus to file for the liquor license (A164).

In July or August, 1961, the defendant asked Morton for additional money for himself, "because the tax bite was going to be so large, there wasn't going to be anything left for his services" (A168). Morton said, "we had a deal Ralph [Berger] and you were going to get your money out of the $50,000." The defendant answered, "the Commissioner was keeping the entire amount and that the tax bite was larger than they expected and there was nothing left for himself" (A168).

It was thereafter agreed that the defendant would be given an additional $15,000 for his services (A170). Dur-

ing the remainder of 1961, the defendant on several occasions relayed to Morton that Commissioner Epstein was very upset at Playboy's continuing direct mailing of membership solicitations into the New York area (*id.*). In the summer of 1962, Judson Morhouse also told Morton of Epstein's annoyance at the Playboy mailings and arranged for Morton to visit Epstein in the latter's hospital room (A171).

After the district attorney's investigation into the State Liquor Authority had been mentioned in the newspapers, in late November or early December, 1962, Morhouse sent for Morton and told him he wanted it clearly understood he represented Playboy Magazine and not the Clubs (A173).

In December of 1962, the Playboy Club received its liquor license, but had to agree not to exclude any members of the public who did not have keys (A174).

Morton also testified that before Playboy opened in New York, it paid $775,000 for the building (A189), encountered architectural costs of over $300,000 (A145) and eventually spent approximately $3,800,000 on the building (A200). Also, before the building opened, Playboy had obtained $1,500,000 of the public's money from the advance sale of keys through its mail solicitations (A193).

Morton further testified that he believed unless Playboy paid as demanded, they would lose their investment in New York (A209). He also felt they were forced to make the payments (A210). Morton did not think he conspired to bribe a public official (A223). Morton said further he and his colleagues felt they were the victims of corruption (A222).

However, Arnold Morton also testified that no one ever threatened him that unless there was a payoff, Playboy would not get its license (A730). He also testified that his definition of bribery was "to pay for something you are not entitled to" (A731). He further testified that when he appeared before the grand jury, his answers were true where he stated that he appreciated that "the whole thing was illegal and a conspiracy to pay off a public officer" (A720).

As to his state of mind at the time of the payments to the defendant, Morton testified that the Playboy officers had their doubts that they were entitled to get the license they wanted (A199) and they regarded the payments as additional insurance that they would stay in business in New York (A227).

Robert Preuss testified he was Vice-President in charge of finance and the business manager of the Playboy Clubs and Playboy magazine (A234). He first met the defendant when Morton brought him into his office early in May, 1961, to discuss reimbursement for his expenses in travelling to New York on behalf of Playboy (A238-9). When Preuss questioned giving Berger any more money since the defendant had already been paid $5,000, the defendant stated that that sum was for his services, but he had also spent other money for which he wanted reimbursement (A239). Berger asked for a figure in excess of $5,000, but Preuss told him to submit a bill "outlining" his expenses to amount to approximately, but not exactly, $1,500, and Playboy would pay the bill (A240).

At this same meeting, the defendant told Preuss he had brought Morton to see Morhouse who was the man who

would see that Playboy got its liquor license (A254). When Morton had reported back to Hefner, Lownes and Preuss and told them that Morhouse wanted $20,000 yearly for five years, Preuss asked, "On top of Epstein?" Morton answered, "yes." Preuss also testified that when Morton related his conversation with Morhouse, Hefner inquired "how high up does this go?" Victor Lownes interjected, "I think we ought to blow the whistle on this whole affair," to which Hefner countered, "but who do we go to?" (A256). Morton asked Lownes to go back with him to see Morhouse and verify what he had said (A257).

After the second trip to Morhouse, Morton told Preuss that the defendant said it was time to pay Epstein part of his money (A258-9). On June 27th, 1961, Preuss delivered to the defendant two checks for $12,500, as the defendant had asked that the $25,000 be split and paid to different parties to help him in his tax situation (A246, A250). The defendant gave Preuss a voucher for the one check payable to Lee Berco Co., Inc. and promised to mail the other voucher on the letterhead of Harry Steinman, the other payee, later (A249). The defendant told Preuss he would run the checks through the bank accounts of the payees, pay the tax, and the remainder would be paid to Epstein (A250).

Morhouse met with the Playboy officers in Chicago in late June or early July where again the subject of the stock options was discussed. But when Preuss said it would be necessary to publish any stock options given to Morhouse in a public prospectus, Morhouse said, "Well, we can't have that" (A260). Morhouse also directed that his retainer be paid by Playboy magazine and not Playboy

Club (*id.*). On July 17, 1961, Morhouse then sent a bill for his first $20,000 retainer to Playboy magazine (A261). Playboy sent him an installment of $10,000 by a Playboy Club check which Morhouse returned asking again that he be paid by the magazine, which was done on August 22, 1961 (A262-4).

In early August of 1961, the defendant came to Preuss, accompanied by Morton, and told Preuss that Epstein had told him that "this was a much more difficult case than he had first anticipated and that he was retaining the entire proceeds" from the $50,000. The defendant said he would have to obtain his share of the $50,000 directly from Playboy (A265). Preuss told the defendant on August 17, 1961, that Playboy would pay the defendant an additional $15,000, with $5,000 to be paid shortly and the remainder later (A266).

On January 31, 1962, Preuss testified that the defendant came to him and said Epstein was very ill and needed additional funds and it was time to discuss payment of the remaining unpaid balances on Epstein's $50,000 and the defendant's $15,000 (A282). The defendant and Preuss then worked out a schedule of payments (A282-3). This money was eventually paid to the defendant with the exception of $9,000 for Epstein (A308).

In February, 1962, Morhouse called Preuss for payment of the balance of his $20,000 and told Preuss to keep $2,000 to pay Marrus and Preuss sent the remaining $8,000 to Lyman Associates, Inc. (A303-5).

All the checks given to Berger or Morhouse were charged to legal or promotional expenses (A311).

Robert Preuss testified the Playboy officers thought they were victims of an extortion (A323). He felt Playboy was compelled to make the payments in order to be able to open up the club in New York (A327).

Robert Preuss under cross-examination explained that since he had had the legal definition of bribery explained to him subsequent to the events of the conspiracy, "we [the Playboy officers] did intend to enter into a conspiracy to bribe a public official" (A323). It was also Preuss' testimony that the Playboy officers did not inform their attorneys in Chicago of their dealings with the defendant until they had been served with a subpoena by the District Attorney's Office (A349-350).

Victor Lownes testified that during the period of the conspiracy he was Vice-President and Promotional Director of Playboy Clubs International, and the company that published Playboy magazine (A360). In January, 1961, he and Hugh Hefner conferred with Chairman Epstein in New York regarding the Playboy license (A363).

At this meeting, Lownes told Epstein that Playboy had won an Illinois court case upholding their right to demand a one-time admission charge for the purchase of a key without regard for the purchaser's "race, creed or color" (A364). Nevertheless, Epstein insisted they operate as a "not-for-profit" club in New York and "we were going to operate his way or not at all" (A364-5). Epstein also mentioned that the Gaslight Club was following his recommendation and shifting over to a not-for-profit private club method of operation. Hyman Siegel, who was present at this conference as the attorney for Playboy, there-

upon commented he was willing to bet that the Gaslight Club would now get their license (A365).

After this meeting with Epstein, Lownes recommended that Playboy "forget all about trying to make any kind of deal with Epstein through Berger," apply for a license in the regular way and then "fight the thing through the courts" as had been done in Illinois (A367).

Lownes corroborated Morton's testimony on the second meeting with Morhouse, and the testimony of Preuss regarding the conference among the Playboy officers that followed Morton's first meeting with Morhouse (A369-72). He further corroborated the testimony of Morton and Preuss concerning the meeting with Morhouse in Chicago (A373).

Victor Lownes on cross-examination testified that when the Playboy officers paid the money to the defendant and Morhouse, they felt they were the victims of an extortion (A391). He also said on cross-examination that he understood bribe and fix to mean trying to get something that was illegal (A385) but stated the Playboy officers did do something illegal in getting what they were entitled to (A385). He further testified that his answers were true when he testified before the grand jury that they called the payments to Berger and Morhouse extortion because they never demanded anything they weren't entitled to (A391).

George Kelly, counsel to the Michigan Avenue National Bank of Chicago, testified that the Lee Berco Co., Inc., bank account was carried at this bank, that Ralph Berger was the only person authorized to draw on that

account, and that the various Playboy checks payable to Lee Berco Co., Inc. cleared through this bank account (A490-6).

The Tenement conspiracy

Frank Jacklone testified he was the owner of a supper club known as "The Tenement" which had a liquor license (A375). Jacklone stated he had encountered difficulty in obtaining the liquor license for his club, and had been forced to withdraw his first application (A396). His second application was encountering further delay despite the payment of $10,000 to Martin Epstein's brother-in-law, Nat Roth, who, together with another attorney, was handling the defendant's second license application (A397, A406, A443-4).

In May, 1962, Jacklone sought the assistance of Harry Steinman (A397, A455-6) who put him in touch with Berger by telephone (A399). He received assurances from the defendant (A401).

Jacklone first met the defendant personally on June 25, 1962, at Kenny's Steak Pub in New York County, where Berger was introduced to him by Harry Steinman (A405-6). The defendant told Jacklone he had just spoken to "Mr. Epstein" and that Jacklone would have no trouble obtaining his license; but it would cost $10,000 (A401). Jacklone was told by the defendant that this sum of money was going entirely to Epstein except for the defendant's expenses (A404), and the defendant added that "he was handling Playboy and it was costing them a lot more than I [Jacklone] was paying" (A473). Jacklone agreed to deliver the $10,000 to the defendant on the day he received his license (A405).

Steinman thereafter introduced Jacklone to an attorney named Harry Neyer, who was to "follow" Jacklone's license application then pending before the State Liquor Authority (A409). Steinman was also given a $2,500 prepayment on the $10,000 to hold for Jacklone in advance of obtaining the license (A455).

On June 28, 1962, Steinman notified Jacklone that his application had been approved; Jacklone received it that day (A410). But Jacklone was unable to deliver the balance of the money that day as he had agreed, and when he called Steinman to tell him this, the defendant got on the phone and said "after you have your license, maybe you think you are set; but you could also lose it the same way you got it" (A411-12).

On the morning of June 29, 1962, Jacklone delivered the balance of $7,500 to the defendant in Steinman's office with Steinman present (A412-13). The money was handed over to Berger, who counted it in Jacklone's presence (A413); some small talk followed before Jacklone left (A414).

Detective **Anthony J. Bernhard** testified that on June 25, 1962, he observed the defendant entering the hospital room of Martin Epstein, leave a short while thereafter and go to Kenny's Steak Pub where he met Frank Jacklone. There the defendant was overheard saying to Jacklone, "don't worry, everything will be all right, I just spoke to him" (A467).

Detective **James Poulos** testified that on June 27, 1962, he observed the defendant enter Martin Epstein's hospital

room, remain a short while and leave (A484). On June 29, 1962, at approximately 2:30 p.m., he also watched the defendant again entering Epstein's hospital room, remaining inside until a nurse left, and then looking up and down the corridor before going back into the room with Epstein (A485). At 3:37 p.m. the defendant left the hospital room (*id.*).

Detective **Walter Finley** testified he saw the defendant enter a phone booth in the lobby of the New York Hospital at about 6 p.m. on June 27, 1962 and overheard a portion of the conversation where the defendant said: "You had better get in touch with Harry, he called down there at a quarter to five and the approval was in" (A480). On June 29, 1962, Detective Finley took motion pictures of the defendant exiting from New York Hospital (*id.;* Exh. 46).

Detective **William Reilly** testified that on June 28, 1962, he listened to and recorded, by means of an electronic eavesdropping device, a conversation emanating from the office of Harry Steinman in which Steinman and the defendant participated (A543, A593). He also recounted what his independent recollection was of the conversations he overheard (A543, A548, A550). There were no erasures by accident while he was supervising the actual original recording (A609). When he subsequently replayed the tape, in preparing a transcript of the conversations thereon, he made no erasures, deletions or additions (A702). The transcript (Exh. 63) of the tape that he prepared with the assistance of two other detectives was a true and accurate transcript of the conversation he recorded on June 28th (A653). There was earlier testimony on how he was able to identify the voices on the tape (A538, A544).

[June 28th was the date Jacklone was to have delivered the balance of the $7,500 bribe to the defendant but failed to do so.] On the tape (Exh. 61A) the defendant complained at length to Steinman that the money had not been delivered as promised and he (Berger) had an appointment at the hospital.

Detective **Sidney Berkowitz** testified that on June 29, 1962, he overheard and recorded by means of an electronic eavesdropping device, conversations emanating from Harry Steinman's office in which the defendant, Steinman, and Jacklone participated (A610). He also testified as to how he was able to identify the voices on the tape (A611, A617, A622). He never made any additions, deletions or erasures on the tape of June 29th (A708). Detective Berkowitz also prepared a transcript (Exh. 62) of the conversation on the tape which was a true and accurate transcript of the conversation recorded on the tape (A623). Under cross-examination, Detective Berkowitz carefully explained the mechanics of his preparation of the transcript and how he differentiated in the transcript between pauses and inaudible portions (A624-52). On the recording (Exh. 61A), Frank Jacklone is heard to deliver the $7500 to the defendant who then counts it. Steinman is heard to tell Jacklone to make out a check to Harry Neyer for $250.

Frank Jacklone, recalled, testified that he had listened to this tape recording of June 29th (Exh. 61A), compared it with the transcript of his recorded conversation (Exh. 63) and that both the tape and the transcript were true and accurate reproductions of that conversation (A711-12).

Detective **Henry Cronin** testified that on December 10, 1962, the District Attorney of New York County instituted

Reciprocal Witness Proceedings in Cook County, Illinois, pursuant to Section 618-(a) of the Code of Criminal Procedure, to obtain the defendant's testimony before a New York County Grand Jury (A517, A528-30). [The defendant never testified before the grand jury (A556).] On December 10, 1962, the defendant was served with process directing his appearance before the Criminal Court of Cook County (A517-18). The defendant then accompanied the police officers to the Chicago Criminal Courts Building (A506, A523) and while standing in a corridor of that building awaiting his attorney (A526), the defendant was observed to surreptitiously tear up and discard in two separate locations two cards, one bearing the name and phone number of Harry Neyer and one bearing the name and phone number of Martin Epstein, Chairman of the New York State Liquor Authority (A506, A508; Exhs. 56, 57).

Questions Presented

1. Is Section 813-a of the New York Code of Criminal Procedure, which allows electronic eavesdropping pursuant to court order, constitutional?

2. Were the eavesdropping orders based on probable cause sufficient to satisfy Fourth Amendment requirements?

3. Does the Constitution prohibit the reception in evidence of tapes which were only in small part inaudible, and of transcripts prepared therefrom?

4. Was the seizure of two small cards, torn up and discarded in the hallway of a courthouse by the defendant while in police custody, permissible under the Fourth Amendment?

5. Does the Constitution prohibit asking prosecution witnesses whether they had invoked the privilege against self-incrimination while testifying before the grand jury?

POINT I

The evidence obtained by eavesdropping was properly admitted [answering petitioner's Points I, II, III and V (brief, pp. 10-26, 31-32)].

In the course of the trial, the prosecution introduced into evidence a tape recording of conversations, in which the petitioner participated, which were highly relevant to the conspiracy. This tape recording had been obtained by means of an electronic eavesdropping device, installed pursuant to court order in the office of Harry Steinman, a co-conspirator of the defendant under both counts of the indictment. At the outset of the trial, the court conducted a hearing, wherein the defendant was afforded the opportunity to challenge the eavesdropping evidence (A53-99). After the hearing, the court denied the defendant's motion.

The defendant employs a twofold argument against the eavesdropping evidence: first, he claims that the affidavits upon which the court orders were obtained pursuant to Section 813-a of the Code of Criminal Procedure are legally insufficient, and, second, he contends that eavesdropping is, in any case, unconstitutional.

The affidavits and court orders pursuant to which the eavesdropping was authorized are contained in a supplementary appendix to the main record. There are two separate orders for two separate eavesdropping installations, the first in time being for the office of Harry Neyer, and the second, the office of Harry Steinman. The second order was obtained as a result of conversations overheard on the first

eavesdrop. The eavesdropping evidence introduced at the trial came solely from the second eavesdrop in the office of Harry Steinman.

Both electronic searches were based on probable cause. Prior to the first application for an eavesdrop order, Ralph Pansini, who was cooperating with the District Attorney's Office, talked with Albert Klapper, ostensibly an attorney in the office of Martin Epstein, the S.L.A. commissioner, and with Harry Neyer, to whom Pansini had been sent by Klapper, about his prospective application for a liquor license (A56-7). These conversations were secretly recorded on a miniature device known as a Minifon, worn by Pansini (A55-6). In these discussions, the entire corrupt system prevailing in the State Liquor Authority was outlined to Pansini by those soliciting a bribe on behalf of Martin Epstein. Pansini was told in effect that to insure a favorable decision on his license application he would have to pay the right price and hire the right attorney to handle the transaction. In Pansini's case, the price was $10,000 and the attorney was Harry Neyer. Neyer himself acknowledged his awareness of the system and willingness to serve. Thus, he was placed in the center of the conspiracy to bribe a public official by his own words and those of a confederate. Accordingly, probable cause existed to believe that evidence of bribery would be uncovered by monitoring Neyer's office, the place from which he conducted his part in the criminal scheme.

The expectations of the authorities, moreover, were not disappointed, for the electronic installation soon brought to light other conspiracies and other conspirators. One of

these was Harry Steinman, a prospective liquor license applicant and night club owner. Steinman agreed to pay to Neyer $30,000 to insure the defeat of revocation proceedings against a raided dance hall known as the Palladium. Other conversations made it apparent that conferences relating to the payment of unlawful fees to obtain liquor licenses were scheduled for Steinman's office (A58-9), another factor leading to the reasonable belief that evidence would be uncovered by overhearing meetings there.

Consequently, the evidence incontrovertibly implicating Neyer and Steinman in the center of the conspiracy, probable cause clearly existed to believe that evidence of the conspiracy to bribe public officials would be uncovered by an electronic search of their premises.

The petitioner, however, notes that some of this information was not specifically set forth in the affidavits submitted to obtain the orders although he does not, and of course cannot contest that the facts were known to the authorities, since the tapes and transcripts of Pansini's conversations with Klapper and Neyer, and the conversations recorded in Neyer's office were all introduced into evidence at the hearing. Instead, he argues that no showing was made on the record that the issuing justice was ever apprised of the facts in the possession of the District Attorney's Office. However, the record reveals that a showing was made at the hearing that the issuing judge was apprised of the facts. The prosecutor specifically stated that "the District Attorney of New York County obtained the evidence that went to a Justice of the Supreme Court of the State of New York. We presented our evidence to that judge; we told him what we were look-

ing for; we told him the conversations we were attempting to obtain and we related to him the evidence'' (A90).

In any event, petitioner's challenge to the proceedings before the issuing judge are obviated by the same factors which repel his attack upon the support for both the Neyer and Steinman orders: in the case of the Neyer order, because he is without standing; in the case of the Steinman order, because the affidavit is sufficient on its face.

The first (Neyer) eavesdrop

The petitioner's assault upon the sufficiency of the affidavit supporting the order for eavesdropping on Harry Neyer's office is doomed without regard to its merits, for he is without standing to launch it.

Since Berger was not present during the overheard conversations and had no interest in the premises wired, there could have been no invasion of his constitutional rights by the installation. Nor did he acquire standing to challenge this order because resulting evidence was subsequently used to support an order which he did have standing to challenge. Since material seized in violation of the constitutional rights of one person can not be challenged when used in evidence against another, then certainly it is immune when employed as the basis for an order in the nature of a search warrant where the rules are somewhat relaxed. And it is well settled that such is the law.

Eavesdropping, as a search for and seizure of oral evidence, is controlled by the Fourth Amendment to the Constitution [*Silverman* v. *United States,* 365 U. S. 505 (1961)].

Thus, authorities dealing with physical evidence, and the acquisition and suppression thereof, are directly applicable here. And the petitioner's lack of standing to challenge the legality of the means by which evidence was obtained from Neyer's office is the inescapable conclusion from the leading decisions of the Supreme Court and of New York as well. *Jones* v. *United States,* 362 U. S. 257 (1960), is, of course, the father of the line, holding that only the party aggrieved by an allegedly illegal search has standing to challenge the use of its product. The person aggrieved, the decision made clear, was the person whose curtilage was invaded by the search, not the person against whom the evidence may eventually be used.

More recently, the doctrine was reaffirmed in the famous decision of *Wong Sun* v. *United States* [371 U. S. 471 (1963)] a case whose facts are directly relevant to the present issue. In *Wong Sun* an illegal entry into the premises of one Toy led to admissions incriminating Yee. In Yee's premises, the authorities uncovered narcotics which Yee said were given to him by Wong Sun. The evidence found in Yee's premises, the Supreme Court decided, could not be used against Toy, the discovery of the drug stemming from the initial illegality involving Toy. But significantly, this Court held that the evidence was nonetheless admissible against Wong Sun, since he had no standing to challenge the seizure, his private rights not being violated [371 U. S. at 491-2]. Similarly, even assuming *arguendo* that the search of Neyer's premises was unlawful, Berger, who was not present and had no interest in that premises, is in the same position as Wong Sun: neither has standing to protest [also see, *People* v. *DeVivo,* 23 App. Div. 2d 793 (1st Dept. 1965)].

Moreover, standing to challenge the statutory validity of the Steinman order does not confer standing to attack the sufficiency of the Neyer affidavit. While the facts leading to a determination of probable cause in the Steinman order are indeed subject to petitioner's inquiry, the actual sufficiency of the Neyer affidavit is not. Since the cause for the Steinman order extends back and includes facts leading to the Neyer order, his challenge necessarily calls for review of the entire investigation. But the question: Which of these facts were included in papers seeking an eavesdrop order on Neyer? is outside the proper area of the petitioner's challenge. He must restrict his attack to the order which, allegedly, infringed upon his own right to security: the Steinman order. And thus limited, his attack fails, for the affidavit supporting the order to eavesdrop on Steinman's office is adequate on its face to spell out the requisite probable cause.

The second (Steinman) eavesdrop

Even assuming that the basis for probable cause was not spelled out in the Neyer affidavit, the investigators nevertheless knew sufficient facts, and set them forth with a high degree of specificity in the affidavit supporting the Steinman order. For in it, the corrupt system employed by the conspirators was spelled out, the evidence showing that large sums of money were required to obtain a liquor license, and that certain attorneys served as conduits, relaying the bribes from the applicants to the public officials. Neyer was described as one of these attorneys. Steinman was shown to have agreed to pay a $30,000 bribe for a license, and meetings were alleged to occur in his office pertaining to the scheme. Thus, reason to believe evidence of

the crime would be uncovered through an electronic search of his premises was established. Furthermore, the source of this information was equally explicit in the Steinman affidavit, the deposition tracing the information to overheard conversations which had taken place in Neyer's premises.

The constitutionality of eavesdropping

The petitioner's brief throws down the gauntlet on the issue whether eavesdropping, as judicially controlled and regulated in New York under Section 813(a) of the Code of Criminal Procedure, can, under any circumstances, be constitutional. His argument rests primarily upon three decisions of the Supreme Court of the United States, *Mapp* v. *Ohio*, 367 U. S. 643 (1961); *Silverman* v. *United States*, 365 U. S. 505 (1961) and *Clinton* v. *Virginia*, 377 U. S. 158 (1964). However, an analysis of these cases reveals no such support for the defendant's position. In the *Silverman* case, this Court excluded from evidence eavesdropped conversations obtained by means of a "spike" microphone driven through an adjoining wall into the defendant's premises by District of Columbia police. The holding of the *Silverman* case is explicitly based upon the fact that the trespass was without warrant and thus an unconstitutional search and seizure. The case has little applicability to the instant matter where the eavesdropping was conducted pursuant to warrant obtained under Section 813(a) of the Code of Criminal Procedure. Indeed, the concurring paragraph of Justice Clark in *Clinton* states that that court found that "the 'spike' mike used by the police officers penetrated petitioner's premises sufficiently to be an actual trespass thereof" thereby indicating the

Court did nothing more in *Clinton* than apply the *Silverman* case to the states where the eavesdropping lacked court authorization. [See also the reversed decision of the Virginia Supreme Court in *Clinton* v. *Commonwealth of Virginia,* 204 Va. 275, 130 S. E. 2d 437, 441.]

More importantly, the Supreme Court has indicated that eavesdropping *per se* may be permissible under the proper judicial supervision. In his dissenting opinion, Justice Brennan stated in *Lopez* v. *United States,* 373 U. S. 427 (1963), at 464:

> "But in any event, it is premature to conclude that no warrant for an electronic search can possibly be devised. The requirements of the Fourth Amendment are not inflexible or obtusely unyielding to the legitimate needs of law enforcement. It is at least clear that 'the procedure of antecedent justification before a magistrate that is central to the Fourth Amendment' * * * could be made a precondition of lawful electronic surveillance."

Similarly, in his concurring opinion in *Silverman,* Justice Douglas called for a warrant issued by a magistrate to authorize an electronic search [365 U. S. at p. 513]. The statements of Justices Douglas and Brennan echo the dissenting opinion of Justice Murphy in *Goldman* v. *United States,* 316 U. S. 129, 140, note 6 (1942), wherein he called for a warrant or responsible administrative supervision of eavesdropping conducted by law enforcement agents.

Underlying the defendant's position appears a dual rationale developed from an opinion by Justice Sobel in *People* v. *Leonard Grossman,* 45 Misc. 2d 557 (Sup. Ct. Kings Co. 1965). In pertinent part, this decision declares

any eavesdropping order to be unconstitutional because it cannot satisfy the requirement of specificity enjoined by the Fourth Amendment and because it authorizes a search for mere evidence. Appropriate deference to the industrious and scholarly Judge cannot avert the characterization of his opinion as erroneous. [The Columbia Law Review terms it "insensitive" and "unconvincing." 66 Col. Law Rev. 355, 376 (1966).]

Significantly, the defendant does not adopt the error expressed in that decision that, because eavesdropping requires a "trespass," it is invalid. Obviously, a search for physical evidence necessitates physical entry no less than the planting of a microphone. It is for this reason that prior legal authorization is required in the form of a warrant, which cancels the "trespass." Without trespass, an eavesdrop cannot offend the Fourth Amendment. Accordingly, the Supreme Court upheld the admission of evidence, surreptitiously overheard, where no trespass occurred: in *Lopez* entry was by invitation [see, also, *On Lee* v. *United States*, 343 U. S. 747 (1952)]; in *Goldman*, the electronic device did not penetrate the curtilage.

The pillar upon which Justice Sobel's opinion specifically rested is the contention that since eavesdropping is a search for "mere" evidence, it is constitutionally prohibited [45 Misc. 2d at 569]. This position is derived from the line of cases arising from *Gouled* v. *United States*, 255 U. S. 298 (1921), an unfortunate opinion, founded upon an erroneous view of the constitutional history of the Fourth Amendment and under increasing attack in state courts [see *People* v. *Thayer*, 47 Cal. Rept. 780, 408 P. 2d 108 (1965); *State* v. *Bisaccia*, 45 N. J. 504, 213 A. 2d 185

(1965)] and legal journals [see, e.g. Eavesdropping Orders and the Fourth Amendment, 66 Col. L. Rev. 355 (1966)]. The *Gouled* opinion declares (255 U. S. at p. 309) that as a result of *Weeks* v. *United States,* 232 U. S. 383 (1914) and *Boyd* v. *United States,* 116 U. S. 616 (1886), search warrants may not be used to search for "mere evidence." "Mere evidence" is any evidence which is not a means or instrumentality by which a crime is committed, nor fruits of a crime, nor contraband, nor a weapon [*United States* v. *Lefkowitz,* 285 U. S. 452 (1932)]. The *Weeks* case announced the federal exclusionary rule for unconstitutionally obtained evidence. The *Boyd* case involved a forfeiture proceeding under the federal laws and the court held that compelling a defendant pursuant to statute to produce certain invoices upon pain of an adverse finding of fact violated the Fifth Amendment of the federal constitution as well as the Fourth Amendment. One of the rationales announced in that decision was that the government may seize only that property which the accused is not entitled to possess under the ancient principles of property law. Under this theory, stemming from the ancient law of deodand, title in the instrumentality of the crime shifts to the government and the property is forfeit because of its illegal use. [See *United States* v. *Kirschenblatt,* 16 F. 2d 202 (2d Cir. 1926); see Kaplan, Search and Seizure: A No-man's Land in the Criminal Law, 49 Cal. L. Rev. 474, 478 (1961).]

As Justice Weintraub stated in the *Bisaccia* case (*supra*):

> "The right-to-possession rationalization of the law of search and seizure is too feeble and too contrived to

> endure * * * It would demean the law to vindicate a search and seizure in terms of a proprietary interest when everyone knows the quest is usually for evidence of guilt and nothing else."

The modern view is that the exclusionary rules exist to protect personal rights and to enforce the rights protected under the constitution. They are not intended to enforce the property rights of the sovereign. Obviously, the Fourth Amendment was not drafted with deodand in mind. [See *Jones* v. *United States,* 362 U. S. 257, 266 (1960); *People* v. *Thayer, supra,* at p. 109.]

The *Boyd* case also spoke of the interplay between the Fourth and Fifth Amendments and reasoned that as the Fifth Amendment forbade the extraction by compulsion of self-incriminatory evidence from anyone, this threw light on what was an unreasonable search under the Fourth Amendment. The *Boyd* case indicated that the Fourth Amendment forbade the obtaining of any evidence whatever by search warrant (unless the property came within the primary deodand right of the state). This theory too was well answered by Chief Justice Weintraub in *State* v. *Bisaccia* (*supra*) at page 188:

> "But it is not apparent how the Fifth Amendment can make illegal a search and seizure which the Fourth Amendment permits. The Fourth has its own expressed limitations upon search and seizure; there is no reason to suppose the framers of the Amendments intended to imply through the Fifth an additional limitation upon the Fourth."

It is impossible to sustain the "mere evidence rule" under the Fifth Amendment since private papers, which are the instrumentalities of a crime such as in *Abel* v. *United States,*

362 U. S. 217 (1960), and thus seizable, are no less self-incriminatory because they are the instrumentality of a crime. Furthermore, the fact that "mere" evidence can properly be seized and used in evidence if taken from the person, rather than the premises [*United States* v. *Kirschenblatt,* 16 F. 2d 202 (2d Cir. 1926); *United States* v. *Kraus,* 270 F. 578 (D. C. N. Y. 1921); also see, *Abel* v. *United States, supra*], is a distinction certainly inapplicable to the Fifth Amendment protection. Accepting, then, that the intention of the framers of the Fourth Amendment was to protect the privacy of the citizen from unreasonable searches, it is impossible to understand why the admissibility of the evidence obtained should depend upon whether it is "mere" evidence or evidence plus something else. The law of evidence contains rules relating to weight, sufficiency, competency or relevancy. The adjective "mere" has no place in the lexicon of the law of evidence. It is a concept without meaning.

There is a suggestion in *United States* v. *Lefkowitz,* 285 U. S. 452, 465-6 (1932), that the "mere evidence rule" is designed to prevent exploratory searches. But as Justice Traynor incisively demonstrates in *Thayer* at 408 P. 2d, page 110, the rule does not prevent exploratory searches, it prevents the seizure of "mere" evidence whether the search is reasonable, unreasonable, specific or general.

The difficulty of giving any meaningful content to the "mere evidence" prohibition of *Gouled* is demonstrated by the way the courts have manipulated the exception whereby objects designated as instrumentalities of a crime may be seized. The meaning of instrumentality of crime has been expanded in such a fashion as to leave little vitality in the *Gouled* rule. [Compare *Marron* v. *United States,* 275 U. S.

192 (1927) with *United States* v. *Lefkowitz*, 285 U. S. 452 (1932).] Thus, as Justice Traynor concluded in *People* v. *Thayer*, 408 P. 2d 108, 112 (1965), the "*Gouled* case is often cited but no longer applied. * * * It has been distinguished to the point of extinction in subsequent opinions by the use of technical exceptions and without discussion of policy. It is universally criticized by the writers and lacks a clear basis in any constitutional language."

Indeed, the invariable practice in the Supreme Court has been simply to ignore the *Gouled* rule in oral evidence cases. And, properly speaking, any incriminating statement is nothing more than "mere" evidence. Yet the seizure of such statements has been many times upheld despite objections based on Fourth Amendment grounds [*e.g.*, *Olmstead* v. *United States*, 277 U. S. 438 (1928); *On Lee* v. *United States*, 343 U. S. 747, *supra*; *Goldman* v. *United States*, 316 U. S. 129, *supra*; *Lopez* v. *United States*, 373 U. S. 427, *supra*; *Rathbun* v. *United States*, 355 U. S. 107 (1957); also see, *Wong Sun* v. *United States*, 371 U. S. 471, *supra*]. And of course, several of these cases specifically involved the use of electronic eavesdropping as the means for searching and seizing [*On Lee* v. *United States*, *supra*; *Goldman* v. *United States*, *supra*; *Lopez* v. *United States*, *supra*]. Indeed, the "mere evidence rule" has not been a basis or even a consideration in those cases in which overheard statements were excluded [*Silverman* v. *United States*, 365 U. S. 505, *supra*; *Clinton* v. *Virginia*, 377 U. S. 158, *supra*; *Wong Sun* v. *United States*, *supra*], the sole consideration being whether the entry was properly authorized.

The appellant may attempt to explain the Supreme Court's neglect of *Gouled* in the cases we cite on the basis

that an oral statement is necessarily seized from the person, a seizure exempted from the *Gouled* rule by some holdings: *Kirschenblatt* v. *United States,* 16 F.2d 202 (2d Cir. 1926); *United States* v. *Kraus,* 270 F. 578 (D. C. N. Y. 1921); also see, *Abel* v. *United States,* 362 U. S. 271 (1959). But if a seizure of words is viewed as a seizure from the person, and such a view is certainly reasonable, then by the same token eavesdropping orders are not susceptible to attack on "mere evidence" grounds either.

Both the *Thayer* and *Bisaccia* cases indicated that the Supreme Courts of California and New Jersey were following the direction of *Ker* v. *California,* 374 U. S. 23 (1963). *Ker* permitted the states to develop their own workable rules of search and seizure and recognized that the distinction between constitutional and supervisory rules serves to separate fundamental civil liberties which the states must respect from federal procedural rules which the states may ignore. [See Friendly, The Bill of Rights as a Code of Criminal Procedure, 53 Cal. L. Rev. 929 (1965).] Thus, opinions written before this distinction assumed its present crucial importance in the federal-state system must now be reinterpreted in this light. In doing so, the California and New Jersey courts have declared the rule of the *Gouled* case to be unrelated to fundamental civil liberties but rather a federal procedural rule and thus not binding upon the states. New York, in affirming the instant case, has apparently agreed.

Beyond these legal arguments, the results of literal application of the "mere evidence rule" would be too absurd for judicial tolerance. As Judge Weintraub convincingly demonstrates in *Bisaccia, supra,* the bloody shirt, shoes to

match footprints, bloodstains, or a corpse, all highly probative evidence, can not reasonably be immune from a warranted seizure.

All of the foregoing discussion has assumed that the eavesdropped conversations in this case were "mere" evidence. In fact, they are more than that. The crime of which the defendant was convicted was conspiracy, the essence of which is an agreement to commit a crime between two or more persons. An agreement betokens communication, which requires the utterance of words. The corpus of the crime, the instrumentality of the crime and indeed the crime itself were the spoken words. [See *Lopez* v. *United States*, 373 U. S. 427 (1963).]

Another argument advanced in Judge Sobel's opinion, although not relied upon as the basis for decision [45 Misc. 2d at 567, 569], is his belief that a warrant authorizing eavesdropping can never sufficiently specify the verbal statements to be intercepted, only the general nature of the discussions being known in advance. But this failure of precognition does not vitiate a warrant, for actually there are many instances in which an exact specification of property to be seized is unavailable to the authorities before a search. Thus, warrants describing "intoxicating liquors" without stating the type, or "narcotic drugs" without naming the specific drug, or "gambling paraphernalia" without attaching an inventory have all been deemed sufficient [see, *Stanford* v. *Texas*, 379 U. S. 476, 486 (1965); *People* v. *Montanaro*, 34 Misc. 2d 624 (Kings Co. 1962), op. by Justice SOBEL; *Johnson* v. *United States*, 46 F.2d 7 (6th Cir. 1931); *Calo* v. *United States*, 338 F.2d 793 (1st Cir. 1964); *Commonwealth* v. *Schwartz*, 82 Pa. Super.

Ct. 369 (1923), cited, 74 A. L. R. 1513]. In these cases the nature of the object of the search is itself recognizable as such to the searchers, and thus differentiated from non-seizable articles. Consequently, greater leeway is accorded in the description of such property than in a case where the articles may be easily confused with innocent material, as, for example, where stolen furniture is inadequately distinguished from furniture which may be usually found on a premises [*People* v. *Coletti*, 39 Misc. 2d 580 (Westchester Co. 1963)].

In a search for words, although no one knows in advance the exact language to be used or the turn a conversation may take, nevertheless the searchers can readily distinguish discussion concerning, in this case, bribery from a conversation about other matters, and accordingly they can limit the recording of statements. Furthermore, the fact that other conversations not pertinent to criminal activities may also be overheard does not render the search unconstitutionally general. The same broad exposure occurs even in a conventional search for physical matter. For a search warrant for tangible articles authorizes the police to look throughout an area and necessarily sift through innocent and innocuous materials in the hunt for the specific objects designated in the warrant. It is not, however, considered a seizure beyond the bounds of the warrant when articles not described are seen by the seachers. Why then should the fact that the searchers hear extraneous conversation amount to a seizure beyond the warrant? The only distinction is in the sense by which the innocuous is perceived.

Moreover, in a search for tangible property, if evidence other than that authorized by warrant is also seized, the remedy is exclusion of that evidence under *Mapp*. But articles properly taken at the same time under a valid warrant are still admissible. In the present case, no evidence procured through eavesdropping was introduced at the trial other than the conversations which directly pertained to the conspiracy to bribe, the object of the search. Thus the defendant can show no violation of the exclusionary rule of *Mapp*, because of the supposedly general search inherent in eavesdropping.

The order authorizing the Steinman eavesdrop in the instant case, read in conjunction with the affidavit which it adopts by reference, is clearly understood to specify the recording of conversations pertinent to an investigation of official corruption in the S.L.A. involving crimes of bribery, extortion, and the like.

POINT II

The defendant received a fair trial [answering petitioner's Points IV, VI and VII].

The court's determination as to the admissibility of the tape and transcripts was proper [answering petitioner's Point IV (brief, pp. 26-31)].

On the trial, there was admitted into evidence a tape recording of conversations occurring on June 28 and 29, 1962, in which the defendant participated and which related to the conspiracy (Exh. 61A). As an aid to the jury in following the conversations, the court also admitted written transcripts of the conversations on the tape (Exhs. 62, 63). Testimony explained how the conversations were recorded, how the voices were identified and the manner in which the transcripts were prepared.

Before the tape was admitted into evidence, the court listened to it in the absence of the jury, compared it with the transcripts, and ruled it was admissible because it was audible and the "thread of continuity was never completely broken" (A756). The court excluded two other tape recordings because of their inaudibility. The court further ruled that the jury could use the transcripts to follow the tape, but carefully instructed the jury that they alone were to determine what was actually recorded on the tape (A763-4). On two separate occasions, the court also afforded defense counsel the opportunity to move to delete anything in the tape that he felt was incompetent, irrelevant or objectionable; this defense counsel refused to do (A757, A973).

The defendant does not challenge the admissibility of sound recordings generally, but argues here that the recordings introduced against him were so inaudible as to be inadmissible. The trial court found in its preliminary hearing of the tapes that the inaudible portions did not affect the thread of continuity in the conversations nor the intelligibility of the material matters on the tape. The question of whether the unintelligible portions are so substantial as to render the recording as a whole untrustworthy, and thus inadmissible, is a question that should be left to the sound discretion of the trial judge. The exhibits themselves available to this Court, attest to the wisdom of the exercise of discretion by the court below. In *Monroe* v. *United States* [234 F. 2d 49, 55 (D. C. Cir. 1956), cert. den. 352 U. S. 873, reh. den. 352 U. S. 937, motion for leave to file second petition for rehearing denied 355 U. S. 875], the court observed that the failure of a live witness to overhear all of a conversation cannot be used to exclude his testimony regarding those portions he did hear. This rationale is both sound and logical. [See also *Cape* v. *United States*, 283 F. 2d 430 (9th Cir. 1960); *United States* v. *Shanerman*, 150 F. 2d 941, 944 (3d Cir. 1945); *People* v. *O'Keefe*, 306 N. Y. 619 (1953).]

Building on the untenable premise that the tapes themselves are inaudible, the defendant complains of the use of the transcripts furnished as an aid to the jury. Terming these carefully prepared transcripts "appalling" (brief, p. 28), he asserts they could not properly be used to assist the jury in following the "manifestly worthless" recordings (brief, p. 28).

Transcripts of tape recordings are admissible in evidence in New York on the theory they are as much of an aid to a jury as a photograph, map or mechanical model. *People* v. *Feld*, 305 N. Y. 322, 331-332 (1953). Surely, where the tape itself, on any fair appraisal, depicts clear and material conversations, a transcription thereof is wholly innocuous. Commonly, the written word serves as an aid to comprehension of the sense of the most intelligible spoken word; for example, many Shakespeare lovers follow a written text while listening to a recorded performance. For this purpose, the transcripts furnished here were both useful and proper. In addition, the transcripts identified the voices, thus serving as a continuing reminder of the prior testimony of the officers who had identified the voices on the tape itself.

Concerning those parts of the tape which were inaudible or difficult to hear, it should first be remarked that the transcripts themselves reflected the gaps in audibility, thus preserving the integrity of the primary exhibit. In several instances, notably where conversation was rapid or one voice was overlaid by another speaking simultaneously, the procedure for preparation of the transcript allowed extraction of meaningful words from the tape. Indeed, it is significant that the petitioner, for all his denigration, is, and has always been, unable to point to a single passage on the transcript which is not a precise rendition of the taped words.

Instead, he misconstrues the record to impeach the accuracy of the transcript by asserting that the tape was replayed "many hundreds and perhaps thousands" of times to arrive at the transcript (brief, p. 29). The record, how-

ever, is perfectly clear in this regard. Each transcript contains several hundred words which required the detectives, in the interests of accuracy, to play the tape for several words or a phrase, stop the tape, transcribe these words then reverse the tape slightly and replay again to lead into the next series of words. This was what was meant by several hundred replays of the tape rather than several hundred replays of the tape from beginning to end (A625-6, A634-5, A644).

But even were it otherwise, the laborious preparation of transcripts, even where the tape is demonstrably unclear, is no bar to its use; the effort insures the verity of the transcripts, thereby serving defendant's interests. [See *People* v. *Ketchel,* 59 Cal. 2d 503, 381 P. 2d 394, 400, 401; *People* v. *O'Keefe* (3d Dept. 1953) 281 App. Div. 409, on reargument, setting aside reversal in 280 App. Div. 546, and affirming judgment of conviction; aff'd 306 N. Y. 619, rearg. den. 306 N. Y. 744, cert. den. 347 U. S. 989.]

Attempting to support his attack upon the audibility of the tapes, the defendant stresses that the court stenographers were unable to transcribe verbatim the spoken words on the tape during the preliminary playing. But the defendant's demand is an impossible one. Even the most skillful and nimble-fingered stenographer could not be expected to transcribe verbatim a recorded two- or three-way conversation, conducted at the rapid pace of business or social talk. A courtroom stenographer is accustomed to the deliberate tempo of the question and answer method of testimony. Furthermore, two or three people were participating in the taped conversations and were interrupting one another or speaking out at the same time. Additionally,

during the conversations, one or another of the participants would make or receive a telephone call and his voice would be in the background, although clearly audible over the primary speakers. This rendered it impossible for any stenographer to transcribe every spoken word recorded on the tape on just one run through. It is remarkable under the circumstances that one stenographer managed to make a fairly accurate transcript of one of the conversations (A1010-15).

The torn cards were properly received in evidence [answering petitioner's Point VI (brief, pp. 32-35)].

While the defendant was awaiting a hearing in Illinois on an application for his rendition under the Reciprocal Witness Act, he was observed to tear, surreptitiously, two small cards and discard them (A506; Exhs. 55, 56). These cards, retrieved by the observant officers, were pieced together and received in evidence over objection on Fourth Amendment grounds. That objection is here renewed, coupled with a passing allusion to the Sixth Amendment (brief, p. 33).

Yet clear authority supports the reception of evidence seized after so unequivocal an abandonment as that manifested here. Indeed, in a case remarkably apt on its facts, the United States Supreme Court upheld the introduction of property seized from a garbage can where the defendant, like Berger, was seen to dispose of it. In *Abel* v. *United States*, 362 U. S. 217, 241 (1960), this Court deemed the property *bona vacantia*, property without an apparent owner and therefore subject to seizure.

The fact that the abandonment occurred in the presence of police officers does not alter the fact that the defendant intended to abandon the property. [See *Hester* v. *United States*, 265 U. S. 57 (1923); *Abel* v. *United States, supra; People* v. *Chitty*, 40 Misc. 2d 580 (1963).] And the petitioner's insistent claim that Berger intended to destroy the cards rather than abandon them is ingenuous. Obviously his sole desire was to keep the evidence from falling into the hands of the authorities. However, he chose to abandon the property to effect that purpose, for by tearing up the cards and throwing one into a trashcan and the other onto the floor of a courthouse corridor, Berger severed all present and future control over the property, leaving it instead to a chance finder. The intent to abandon is also inferable from the defendant's obvious awareness of what was contained on the cards, and the attempt to divest himself of this incriminating evidence.

Contrary to the petitioner's contention, the court quite properly limited defense counsel's attempt to adduce proof from a New York City detective that the reciprocal witness proceedings in Illinois were somehow improperly conducted. Such testimony would clearly have been not only incompetent, but totally irrelevant to any issue before the New York court or jury.

There was no error in asking prosecution witnesses whether they had invoked the privilege against self-incrimination when testifying before the grand jury [answering petitioner's Point VII (brief, pp, 35-36)].

During cross-examination of the officers of the Playboy Club, defense counsel elicited from each witness testimony that each thought he was the victim of an extortion rather

than a co-conspirator in a conspiracy to bribe. Indeed, defense counsel's cross-examination of the Playboy witnesses consisted of little else than this line of attack. On redirect examination the prosecution brought out that each of these witnesses had invoked their constitutional privilege against self-incrimination when previously testifying before the grand jury. The defendant now argues that this was improper and amounted to reversible error, in that an improper inference of guilt could be drawn from a showing that the witness had previously invoked his privilege against self-incrimination.

The basic flaw in the defendant's argument is that it was prosecution witnesses who testified they previously had invoked the privilege rather than the defendant. This privilege is a right that is peculiarly personal and cannot be invoked by anyone else. If there was any transgression, it is the witness' privilege that was infringed and this breach cannot be availed of by the defendant. Cf. *People* v. *Portelli,* 15 N. Y. 2d 235 (1965).

The defense misconstrues the thrust of the cases declaring it prejudicial error for a prosecutor to call to the stand a witness who it is known in advance is going to invoke the privilege [*United States* v. *Hiss,* 185 F. 2d 822 (2d Cir. 1950); see also *People* v. *Levy,* 15 N. Y. 2d 159 (1965)]. The practice condemned in those cases is the invocation of the privilege on the stand by prosecution witnesses to avoid answering questions, which entails some danger that the jury will resolve the unanswered questions against the defendant. The unanswered questions are thus liable to be transformed through the invocation of the privilege by the witness into a substitute for proof in the minds of the

jury. That is not the situation here. In the instant case, there were no unanswered questions resulting from the invocation of the privilege. On the stand, the witnesses testified fully. Because of this, there was no need for the court to instruct the jury on how to treat the witness' refusal to answer a question on the ground of the privilege.

The defendant further argues under this point that he was prejudiced by the elicitation of the fact that the witnesses asked for and received immunity for their testimony regarding the same subject matter for which the defendant was on trial. Certainly, on the direct testimony of the Playboy witnesses, the prosecution would have been entitled to bring out for the benefit of the jury the fact that the witnesses had asked for and received immunity in return for their testimony. Furthermore, the guilt-by-association argument of the defendant falls when considered with the defendant's position at the trial that he was guilty of extortion, of victimizing the witnesses who testified they had previously invoked their privilege against self-incrimination. Since victims do not normally fear incrimination, the fact that the Playboy officers had invoked their privilege was relevant to rebut the defendant's trial position as a self-styled extortionist.

Conclusion

The petition for writ of certiorari should be denied.

Respectfully submitted,

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